

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED MARKETING SOLUTIONS, INC.,)
)
Plaintiff,) Civil No. 09-1392
)
VS.) October 8, 2010
)
ANGIE FOWLER, et al.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: CAMERON McEVOY PLLC
BY: JOHN P. SHERRY, ESQ.

FOR THE DEFENDANT: AMBERLY LAW
BY: VINCENT M. AMBERLY, ESQ.
EINBINDER & DUNN
BY: MICHAEL EINBINDER, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR
U.S. District Court
401 Courthouse Square
Alexandria, VA 22314
(703) 501-1580

INDEX

ARGUMENT BY THE PLAINTIFF 4, 34

ARGUMENT BY THE DEFENDANT 16

RULING BY THE COURT 36

1 (Thereupon, the following was heard in open
2 court at 10:51 a.m.)

3 THE CLERK: 1:09 civil 1392, United
4 Marketing Solutions, Incorporated versus Angie M.
5 Fowler, et al.

6 Would counsel please note your appearances
7 for the record.

8 MR. SHERRY: Good morning, Your Honor. John
9 Sherry here on behalf of plaintiff, United Marketing
10 Solutions, Incorporated.

11 THE COURT: Good morning.

12 MR. AMBERLY: Good morning, Your Honor.
13 Vincent Amberly for the defendants, and Michael
14 Einbinder who has been admitted pro hac vice will
15 address the Court.

16 THE COURT: Good morning.

17 We have cross motions for summary judgment
18 in this case, don't we?

19 MR. EINBINDER: That's right, Your Honor.

20 THE COURT: Who filed first?

21 MR. EINBINDER: I think it was simultaneous.

22 THE COURT: Simultaneously, all right.

23 MR. EINBINDER: There's a motion to be
24 relieved as counsel.

25 THE COURT: We'll take the motion to be

1 relieved of counsel last. We'll let plaintiff go first.

2 MR. SHERRY: Thank you, Your Honor.

3 Your Honor, with respect to our motion for
4 summary judgment, I believe that the issues have been
5 very thoroughly briefed, so I'll limit my comments to
6 what I think may not have been brought up at this point
7 or at least to highlight what I think are the major
8 points with respect to our motion.

9 THE COURT: Doesn't this whole case turn on
10 whether or not the contract is ambiguous and whether or
11 not United Marketing had an obligation to personally
12 prepare all the items for these advertising coupons?
13 Doesn't it turn on that?

14 MR. SHERRY: I believe it does. I know that
15 the defendants have alleged certain what I believe are
16 ancillary breaches, and I think out of the seven that
17 they have listed in their discovery responses initially,
18 three of those appear to have now been abandoned because
19 they weren't addressed in the opposition to our motion
20 for summary judgment.

21 We brought them all up, Your Honor, out of
22 an abundance of caution. And I think it speaks volumes
23 that the defendants in their motion for summary judgment
24 didn't bring up those other breaches which is consistent
25 with Mr. Fowler's testimony at his deposition that he

1 and his wife believed that the big one of the breaches
2 was United Marketing simply outsourcing the production
3 and the services.

4 THE COURT: So, this is a franchise dispute
5 between a franchisor and a franchisee. Is that right?

6 MR. SHERRY: Yes, Your Honor, it is.

7 THE COURT: And United Marketing, the
8 franchisor, entered into a ten-year contract to provide
9 certain services for, I guess it's Greensboro, North
10 Carolina, advertisements that you get in the mail, those
11 coupons that you get in the mail?

12 MR. SHERRY: That's exactly right, Your
13 Honor.

14 THE COURT: Now, is the contract ambiguous?

15 MR. SHERRY: Your Honor, I don't believe
16 that the contract is ambiguous at all. I think the
17 contract is clear that the -- that the services and the
18 products are going to be provided through United
19 Marketing Solutions. And I think that's consistent with
20 the overall intent of the document as a franchise
21 agreement, which is as we've argued in the briefs, that
22 United Marketing Solutions is providing these
23 franchisees with the tools to go out and sell this
24 product that United Marketing has developed.

25 The way the coupon looks, the way it's been

1 put together, how it's mailed out, the process of the
2 mass mailing to these customers, targeting these certain
3 residential areas, that was all created by United
4 Marketing Solutions.

5 And, Your Honor, I submit that there's no
6 evidence that the Fowlers knew how to do any of this
7 before they signed that franchise agreement and then
8 received that information from United Marketing
9 Solutions.

10 THE COURT: But the Fowlers say that they
11 came to some facility United Marketing has and they were
12 shown production facilities and told that, you know, we
13 make our own products here and that's why you can rest
14 assured that this franchise is going to be a great
15 success. Is that right?

16 MR. SHERRY: They have alleged that, Your
17 Honor. Mr. Reed has denied that there are any
18 representations to his knowledge or to anyone else that
19 he's spoken to about the fact that the production
20 services would only ever be provided in that production
21 facility.

22 Now, Your Honor, we've noted in our brief
23 there is a specific provision in the agreement that was
24 initialed by the Fowlers, a standard boiler plate
25 clause, one that says that they agree that they're not

1 relying on any other representations that were made
2 outside of the terms of the agreement.

3 And specifically, Your Honor, I think
4 they're almost alleging that there was a fraudulent
5 representation, but I don't think they said it was
6 intentionally done.

7 But the reality of it is, Your Honor, that
8 there's no indication, I believe, that would carry the
9 day to indicate that United Marketing Solutions'
10 representatives induced them into signing this agreement
11 by stating you absolutely will never have to worry about
12 us outsourcing any of these services anywhere else.

13 And Mrs. Fowler's deposition and also her
14 affidavit don't go that far to say that, Your Honor.
15 When I asked her at her deposition what she recalled,
16 she said that she recalls being shown the production
17 facility, but she couldn't recall any specific
18 representations from any representatives indicating that
19 United Marketing would be the sole source of these
20 services. And --

21 THE COURT: Well, the -- it seems to me that
22 a franchise provides the franchisee with, like you said,
23 a system, advertising. They provide them with the logos
24 like McDonalds may provide the McDonalds operator with
25 the paper that they use to wrap the burgers and the

1 signs and all those things, but nobody says McDonalds
2 has to make them in the franchise agreement. Is that
3 right?

4 MR. SHERRY: Yes, Your Honor. That's
5 exactly our point is they provide -- United Marketing
6 provides the recipe and the Fowlers use that recipe once
7 it's made to do whatever it is that's within the
8 franchise agreement to profit.

9 And I think the issue here is how can that
10 possibly be a material breach simply by having someone
11 else cook the recipe essentially, Your Honor, when it's
12 already laid out.

13 It doesn't make sense because I think by the
14 Fowler's logic, Your Honor, if United Marketing
15 Solutions had created another production facility
16 20 miles down the road and decided it was going to do
17 all that at that production facility, or would that be a
18 material breach because according to the Fowler's
19 implication they were told everything was going to be
20 done at this particular facility?

21 Or, if Your Honor, the Fowlers had been a
22 hundred percent satisfied with outsourcing being done at
23 a different company, perhaps they were able to provide
24 more services that weren't previously available.

25 And Your Honor Mr. Reed has indicated in

1 fact that was the case in his affidavit. But, how is
2 that a material breach? Because the primary purpose of
3 the contract is still being met which is the Fowlers
4 don't have to worry about going to anyone else to get
5 the services. They go out and get the customers. They
6 get the orders. And they can look to United Marketing
7 Solutions and the obligation is on United Marketing
8 Solutions to fill the order.

9 But there is no expressed provision in that
10 contract, and I don't think that there's anything that
11 would allow the Court to imply this that United
12 Marketing Solutions has to do that with its own people.

13 THE COURT: Well, what about the issue of
14 there were instances apparently for 22 years, everything
15 was delivered on time. But there became a point after
16 the outsourcing occurred where they were multiple
17 instances where the coupons were delivered late and
18 according to the Fowlers, they were insufficient but
19 doesn't the contract provide for credit in those
20 instances? Does it provide that they can terminate
21 because of that?

22 MR. SHERRY: That's correct, Your Honor.
23 The contract expressly contemplated instances where
24 there were late mailings or where there were mistakes.
25 The Fowlers have acknowledged that there was a credit

1 system in place in their depositions. And I believe
2 that they've testified in some instances they asked for
3 credits, but in some of these instances, Your Honor, of
4 these five out of ten mailings that they allege were
5 late during this period of outsourcing, they couldn't
6 even recall whether they had in fact asked for credits.

7 And I think that begs the question of if
8 this was such a material breach, if it was so important,
9 why would they not have immediately availed themselves
10 of the credits that they knew of and that were available
11 to them under the agreement?

12 And Your Honor, with respect to the notice
13 of termination that they gave, it was -- if I recall
14 correctly, three lines and it gave absolutely no reason
15 for the actual termination of the agreement.

16 THE COURT: Are they required to have a
17 reason to terminate?

18 MR. SHERRY: They're not, Your Honor. But I
19 would have envisioned that, especially with respect to
20 the outsourcing of the services that the Fowlers would
21 have pointed to perhaps specific communications between
22 them and United Marketing Solutions leading up to that
23 July 7, 2009, termination stating, listen we don't
24 believe that you're allowed to do this. We think that
25 you're violating the agreement. What are you going to

1 do about it?

2 But they haven't pointed to anything like
3 that, Your Honor, and I think it speaks volumes for the
4 fact that --

5 THE COURT: Well, you're asking me. I can't
6 reach into the credibility on summary judgment. Let's
7 stay away from that.

8 MR. SHERRY: Yes, Your Honor.

9 THE COURT: Help me with your theory of
10 damages. I thought it was difficult to follow in terms
11 of how United Marketing Services (sic) is entitled to
12 whatever profits the Fowlers have made. It was very
13 thin. And also you asserted a claim for invoices, but
14 did you give the invoices?

15 MR. SHERRY: I haven't, Your Honor, and the
16 invoices -- the invoices I believe are disputed. So I
17 think to the extent we get that far, Your Honor, that we
18 would end up having -- we have a material issue fact on
19 whether the invoices are due.

20 Our position is that these are invoices for
21 payments that weren't made at the time the Fowlers
22 terminated the agreement and include incentives that
23 were given to the Fowlers based on the fact that they
24 would make a certain number of mailings going forward in
25 the future.

1 THE COURT: But you said there's a genuine
2 issue of fact about that.

3 MR. SHERRY: I believe that's correct, Your
4 Honor.

5 THE COURT: Well, then how do you get to
6 lost profits meaning taking the profits that the Fowlers
7 may have made? How do you get there?

8 MR. SHERRY: Well, Your Honor, there are two
9 ways. First we have our expert designation on this,
10 competing expert designation, competing expert report on
11 the issue of the actual number of the damages.

12 But the position that we've taken, Your
13 Honor, and as set forth in our expert report is the
14 Fowlers wrongly terminated the agreement on July 7th of
15 2009. They immediately began doing business as this new
16 company.

17 Essentially, Your Honor, all they did was
18 they changed the name of the company. They kept, I
19 believe, a majority of the customers that they had as
20 United Marketing franchisee and they also employed some
21 of the same previous employees and kept the same office.

22 So, from a baseline perspective, Your Honor,
23 we're not faced in the loss profits determination of
24 looking at a new type of business and trying to
25 determine what the profits are.

1 I submit, Your Honor, it's easier in this
2 instance because United Marketing Solutions had a right
3 to expect a certain amount of profits from the Fowlers
4 had they continued under that particular agreement.

5 The Fowlers did not do so, and we submit
6 that they breached the agreement. But the reality is
7 that we know exactly the amount of money that the
8 Fowlers were making for United Marketing Solutions in
9 terms of profits from 2007-2008 and starting through
10 2009.

11 And so, Your Honor --

12 THE COURT: So your view is any dollars that
13 they made belonged to United Marketing?

14 MR. SHERRY: Well, Your Honor --

15 THE COURT: You're entitled to a portion of
16 them?

17 MR. SHERRY: We believe that. We have two
18 theories -- two primary theories of recovery on damages.
19 The first is that we should be entitled to the loss of
20 profit that United Marketing Solutions was accustomed to
21 gaining from the Fowlers. And we have taken that
22 through, Your Honor, the end of the noncompete period
23 because what essentially happened when the Fowlers
24 terminated is they just began doing business under a
25 different name, but they kept the majority of the

1 customers.

2 THE COURT: But they had the right to
3 terminate on notice, right?

4 MR. SHERRY: They did.

5 THE COURT: So there's no guarantee they
6 were going to stay 10 years or 12 years, right?

7 MR. SHERRY: There's no guarantee of that,
8 Your Honor. But we only carried out through the
9 24-month period of the noncompete because while they
10 would have had a right to terminate with 120-day notice,
11 they certainly would not have had a right to continue to
12 do the business that they were doing previously as
13 United Marketing Solutions franchisee. And what that
14 ended --

15 THE COURT: Under the noncompete and
16 nonsolicitation?

17 MR. SHERRY: Yes.

18 THE COURT: Let me just wrap this up with
19 one other question. If the damages are quantifiable as
20 you've just asserted, why would there be any claim for
21 equitable relief concerning disgorgement?

22 MR. SHERRY: Well, Your Honor, if the
23 damages are quantifiable, then there would be no
24 equitable claim for relief under disgorgement. Those
25 are alternative theories of recovery of damages, Your

1 Honor.

2 If for some reason the Court finds that it
3 can't ascertain with reasonable certainty the number
4 through our expert, then in the course of providing for
5 damages or fashioning a remedy for my client, we submit
6 that disgorgement would in that case be proper.

7 THE COURT: And, there will be no need for
8 an injunction because United Marketing is out of
9 business; is that right?

10 MR. SHERRY: Your Honor, I don't think there
11 would be no need for an injunction because United
12 Marketing Solutions is out of business. I think there
13 would be no need for an injunction if United Marketing
14 Solutions was able to recover damages and this Court
15 found that the monetary damages were sufficient to
16 remedy or satisfy the breach.

17 But if this Court found that because of
18 whatever factual or legal circumstances exist that
19 United Marketing Solutions for some reason should not be
20 entitled to recover any monetary damages and that the
21 Fowlers should be continued -- continuously able to run
22 this competing business, then I think the preliminary
23 injunction or the permanent injunction at that point,
24 Your Honor, should be granted.

25 THE COURT: All right. I've asked you all

1 the questions I have. Thank you.

2 MR. SHERRY: Thank you, Your Honor.

3 MR. EINBINDER: Good morning, Your Honor.

4 THE COURT: Good morning. You're
5 Mr. Onbacher, right?

6 MR. EINBINDER: Einbinder.

7 THE COURT: Thank you, Mr. Einbinder.

8 MR. EINBINDER: Your Honor, the first
9 question you asked is the one I want to address
10 specifically.

11 This contract is not ambiguous. It provides
12 in numerous places in both the contract and in the
13 disclosure document that was provided to the client, the
14 uniformed franchise offering circular that was provided
15 to my client that United Marketing Services is going to
16 be the sole source, is going to furnish, is going to
17 print and mail the coupons which are the subject of the
18 franchise agreement.

19 This was a business pursuant to which the
20 franchisee obtained printing services from the plaintiff
21 and it's repeated throughout the document.

22 Now what counsel does is he comes up here
23 and he invents an entirely new purpose and intent of the
24 contract, ignoring the very language that's in the
25 document itself. That language unequivocally states

1 they will be the sole source.

2 We examined --

3 THE COURT: The sole source, that has --
4 your interpretation of it is that United Marketing was
5 to be the printer of the documents; is that right?

6 MR. EINBINDER: Correct, in other words,
7 they were a print broker, Your Honor.

8 THE COURT: And as it relates to your
9 client, the franchisee which is selling -- mailing these
10 coupons in Greensboro, they would be the sole source of
11 the coupons for the client's business in Greensboro; is
12 that right?

13 MR. EINBINDER: That's correct, the origin
14 of the printing of those products according to the
15 dictionary definition.

16 THE COURT: So we're talking about printing
17 coupons, right?

18 MR. EINBINDER: That's correct, Your Honor.

19 THE COURT: We're not talking about making
20 miniature statutes by an artist. We're not talking
21 about a commissioned artwork. We're talking about
22 printing coupons.

23 MR. EINBINDER: Correct, Your Honor.

24 THE COURT: And your view is that because
25 the contract requires the franchisor to provide printing

1 services and production service to the franchisee that
2 that means they cannot outsource?

3 MR. EINBINDER: That's correct, Your Honor.
4 And whether or not it's specialized services or not is
5 irrelevant to the question. We first have to look at
6 the contract itself.

7 There are, again, a number of phrases, a
8 number of provisions in the contract that are
9 unequivocal. There's no way to read those other than to
10 require them to provide, to print, to be the source.

11 Your Honor, we defined the word "source"
12 from the dictionary as "being the origin of", Your
13 Honor. And they have to be the origin of the printing
14 services.

15 THE COURT: If they ship the coupons to your
16 client, and they meet all of the requirements of a
17 nice-looking coupon that we get in the value packs at
18 least around this area, how does your client know
19 whether or not it was done in their plant or somewhere
20 else?

21 MR. EINBINDER: Well, there's a lot of
22 direct contact between my -- there was for a period of
23 time for which there -- before there was outsourcing a
24 tremendous amount of contact between my client and --

25 THE COURT: My question was very precise.

1 If the coupon arrives at your client's doorstep in
2 Greensboro and it looks like a nice coupon for Doctor
3 Car Wash that they got -- received before, how would
4 your client know where it was printed?

5 MR. EINBINDER: It doesn't arrive at my
6 client's doorstep. It gets mailed to the consumers in
7 the area, Your Honor.

8 THE COURT: So your client has no way of
9 knowing one way or the other whether or not it was
10 produced at the plant in United Marketing or somewhere
11 else or Kinko's, do you?

12 MR. EINBINDER: Presumably if it's printed
13 somewhere else and it gets there and there's no problem
14 with it, my client won't hear about there being a
15 problem.

16 THE COURT: Then how could there be a
17 material breach?

18 MR. EINBINDER: Well, it becomes a -- first
19 of all, it's a requirement. I don't have to establish
20 that it became a problem, but we have in fact
21 established that it became a problem.

22 THE COURT: My question is how does a coupon
23 originating from Kinko's arriving at the consumer's
24 doorstep constitute a material breach of a franchise
25 agreement?

1 MR. EINBINDER: Because the contract
2 explicitly provided they were going to provide it.

3 Your Honor, if I --

4 THE COURT: Let's focus for a second. We're
5 talking about a business transaction here, and the
6 objection of it is for the Fowlers to make money by
7 delivering coupons to a consumer's household, right?

8 MR. EINBINDER: That's correct.

9 THE COURT: If the coupon gets to the
10 consumer's household and it's a nice-looking coupon, how
11 could that be a material breach of the overarching
12 ten-year franchise agreement?

13 MR. EINBINDER: Once again, Your Honor, the
14 requirement is that they deliver it.

15 Your Honor, if my client were to buy a GM
16 car and someone delivered a Chrysler car instead, that
17 would not be what my client bargained for.

18 THE COURT: We don't have that here, do we?
19 There's no complaint about the quality of the coupons
20 until the outsourcing occurred and even that was only in
21 a limited number of instances; is that right?

22 MR. EINBINDER: In a number of instances,
23 yes. I wouldn't call it limited, Your Honor.

24 THE COURT: All right, well --

25 MR. EINBINDER: There are a number of

1 instances -- the problem is my clients were told -- my
2 clients were entitled to continue the contract as
3 existed which was to be able to deal directly with the
4 franchisor when there were printing problems which
5 became a problem in the instances in which they were
6 outsourced, to make sure that printing was done
7 correctly which became a problem when they were
8 outsourced.

9 There were a number of instances in which
10 there were problems. I wouldn't call it limited at all,
11 Your Honor.

12 At this point in time, we haven't submitted
13 proof on it but that the contract in my view is clear as
14 a bell that they're required to produce it.

15 We can examine whether or not that was a
16 problem. We may have to do that at trial. But I
17 believe that the contract was explicit. My clients were
18 shown a production facility, shown -- told about a
19 20 years of service, advised that this was only going to
20 be done at this production facility in this way and were
21 entitled to have someone be a printer as opposed to a
22 print broker for them.

23 And Your Honor, to the allegation or to the
24 analogy to McDonalds, I've read the McDonalds contract.
25 It doesn't require McDonalds to produce the hamburger

1 meat. In fact it allows the franchisee to acquire
2 hamburger from any source it wants to as long as it
3 meets certain quality standards.

4 That's not what this contract provided for.
5 This contract provided for printing and mailing and sole
6 source of supply. Nothing --

7 THE COURT: Well, it sounds to me -- and I
8 understand your interpretation may differ from opposing
9 counsel's but the -- if the bottom line on the contract
10 is that United Marketing is to supply a Doctor Car Wash
11 coupon to Ms. Smith's house in Greensboro, they did that
12 except in a number of instances that you are complaining
13 about now.

14 MR. EINBINDER: Correct, Your Honor.

15 THE COURT: And, before there was a
16 complaint, your client had no way of knowing whether it
17 was produced in United Marketing Services or Kinko's or
18 some place else; is that right?

19 MR. EINBINDER: Honestly, Your Honor, I
20 don't know if they would have been able to tell. But
21 there is no complaint that it occurred.

22 THE COURT: There is no complaint that it
23 occurred?

24 MR. EINBINDER: Not at this point.

25 THE COURT: All right. Well, if your -- and

1 this is a very precise question. If your defense to
2 breach of contract is that United Marketing breached
3 first, and I determined they did not, there is no basis
4 to grant your motion for summary judgment; is that
5 right?

6 MR. EINBINDER: No, Your Honor. There isn't
7 any.

8 THE COURT: Why not?

9 MR. EINBINDER: Because they can't prove
10 damages. As a matter of law, they can't prove damages.
11 They would have no remedy.

12 THE COURT: All right.

13 MR. EINBINDER: The law in Virginia is that
14 when there's a notice provision in a contract that
15 states that someone can cancel that contract on a
16 specific period of time notice, the damages are for that
17 period of time, in this case, 120 days.

18 We alleged, they did not respond, did not
19 contest the fact that during that 120-day period there
20 were no printings and mailings that had to be done. So
21 there is no damage during the 120-day period. That's
22 not an issue here, Your Honor.

23 They're claiming they're entitled to damages
24 past the 120-day period and they're not. They have
25 speculative claims. They have a shifting -- Your Honor

1 indicated that you were somehow confused by the damage
2 claim. So am I. And the reason for that --

3 THE COURT: I'm only concerned about the
4 issue of loss profits, how they could say -- how the
5 franchisor could say I'm going to take all the profits
6 made by the franchise from the Fowlers. But I don't
7 think they would be entitled to under the franchise
8 agreement.

9 MR. EINBINDER: That's correct, Your Honor.
10 First of all, they're not claiming loss profits. It's
11 disgorgement that they're claiming what my clients made.
12 That's what they're seeking, disgorgement.

13 THE COURT: Exactly, of profits that the
14 Fowlers made --

15 MR. EINBINDER: Right.

16 THE COURT: -- that they're saying they were
17 entitled to under the franchise agreement.

18 MR. EINBINDER: No.

19 THE COURT: They're saying they're entitled
20 to take it away from you because you breached the
21 franchise.

22 MR. EINBINDER: Correct.

23 THE COURT: But I think we're all clear
24 that's not going to happen.

25 MR. EINBINDER: I think we're all clear on

1 that.

2 THE COURT: All right.

3 MR. EINBINDER: What they claim for loss
4 profits, Your Honor, what they claimed actually for the
5 200 and some odd thousand dollars that they're claiming
6 which by the way started at \$500,000, went to \$750,000,
7 then went to \$273,000 and then went to \$238,000 and
8 several iterations of it, expert report and pleadings.

9 But the last version of their damage claim
10 is \$230,000. And what it represents is that alleged
11 profit that they would have earned by doing X number of
12 more printings for X number of years.

13 THE COURT: I understood that part of their
14 argument. Well, let's focus just for a second here.

15 So are you relying upon a particular
16 definitive Virginia Supreme Court case that says only
17 the notice period is only entitled to damages?

18 MR. EINBINDER: Yes, we cited a case in our
19 brief.

20 THE COURT: All right. Well, what case is
21 it that all they get is the notice period?

22 MR. EINBINDER: Give me a moment.

23 Your Honor, the case that we cited is the
24 *Board of Directors of Newberry Condominium Association*
25 *versus Green Team*, and it's cited at page 14 of our

1 opening briefly.

2 THE COURT: Is that a Virginia Circuit Court
3 case?

4 MR. EINBINDER: That's correct.

5 THE COURT: That's not a Supreme Court of
6 Virginia case?

7 MR. EINBINDER: No.

8 THE COURT: That's all you have?

9 MR. EINBINDER: No, I wouldn't say, no.
10 That's consistent with the law in a number of different
11 jurisdictions. The damages have to be limited to that
12 period of time because the reasonable expectation of the
13 parties when they enter into the contract is that they
14 would only have the relationship for a period of time
15 until it's terminated properly.

16 THE COURT: Well, let me ask you this. That
17 may be true if the franchisee was ending their business
18 operations. But here I have a 24-month noncompete,
19 nonsolicitation. And apparently there's an admission
20 that the Fowlers just basically changed their name.
21 They're continuing to use United Marketing's equipment
22 and employees and customers. So, that's not the same,
23 is it?

24 MR. EINBINDER: Well, Your Honor, the
25 problem is the confusion in the way the allegations have

1 been made.

2 THE COURT: No, I want to focus on my
3 question which is that if you're trying to limit damages
4 to 120 days which is the notice period, maybe if that
5 was the end of the franchisee's business, that argument
6 would have plausibility.

7 I'm having difficulty with the idea that
8 they could, in violation of the noncompete and the
9 nonsolicitation agreement, continue their business and
10 not incur any liability.

11 Can you address that question?

12 MR. EINBINDER: Yes, Your Honor. Well you
13 have to look at when you analyze the question of whether
14 they're entitled to damages for the violation of the
15 noncompete is the law of what damages you get for
16 competing when you have a noncompete clause.

17 And what you get is the loss profit. That
18 is the difference between what you would have earned --

19 THE COURT: Exactly.

20 MR. EINBINDER: -- and what you did earn.

21 THE COURT: For a period of two years, not
22 just 120 days.

23 MR. EINBINDER: For a period of two years.
24 And that case that's cited in our brief, not by then,
25 but in our brief, is a case involving a franchise, where

1 the franchisor had another franchisee doing business
2 near at the location where the former franchisee
3 operated.

4 And the damage claim was based on the
5 difference between what the franchisor earned from the
6 defendant franchisee and the new franchisee, a
7 differential.

8 THE COURT: I understand.

9 MR. EINBINDER: In this case, it's between
10 what they earned allegedly, no proof, but what they
11 earned allegedly and what -- and zero. And the reason
12 it's zero is because they're out of business which
13 defines the speculativeness of this claim, Judge.

14 THE COURT: Well, let's take up the motion
15 in limine now since you brought that up. It's zero
16 because they say -- United Marketing says that the
17 Fowlers and other leaving, they had to shut down.

18 There's been a motion in limine filed. I'm
19 not sure whether it was by the defendant -- by the
20 defendant asking the Court to keep out evidence that the
21 company closed --

22 MR. EINBINDER: No, that we put them out of
23 business is what I want to keep out.

24 THE COURT: I understand. I said that they
25 closed meaning that as a result of not only United --

1 not only the Fowlers but other franchisees leaving they
2 went out of business.

3 MR. EINBINDER: We specifically asked to
4 exclude evidence concerning allegations that my client's
5 actions put them out of business.

6 THE COURT: Correct. Why would I exclude
7 that?

8 MR. EINBINDER: It's not relevant to a
9 single issue in this case. It doesn't tend to prove the
10 breach. It doesn't tend to prove the damages. It
11 doesn't tend to disprove our defenses to the damages.
12 It doesn't tend to prove anything. It's irrelevant.
13 It's speculative. In all honesty, Your Honor, it's
14 unprovable.

15 They had 20 franchisees, and my client was
16 one of them that left in two years, a company that had
17 filed with the SEC --

18 THE COURT: You're saying only one
19 franchisee left in two years?

20 MR. EINBINDER: No, 20 left in two years.

21 THE COURT: Twenty left in two years, right.

22 MR. EINBINDER: My client was one of them.

23 THE COURT: All right.

24 MR. EINBINDER: And this was a company which
25 according to its own SEC filings had extreme

1 unlikelihood of continuing to exist as a going concern
2 for two years.

3 Prior to my client's termination of the
4 agreement, the SEC's file for year ending '08 was that
5 the company would not survive.

6 The loss -- the cumulative losses for this
7 company over the last several years were probably four
8 and a half million dollars.

9 THE COURT: I see. I see.

10 MR. EINBINDER: This is a company that was
11 going down the tubes. And unfortunately, that occurred
12 not because of my client but because of their business
13 structure or whatever. It's not an issue in this case,
14 but yet they come back and always assert that somehow my
15 clients were responsible for it when even if the
16 franchisees were responsible for leaving and causing the
17 demise, my client is one of 20.

18 It's speculative, Your Honor. It has
19 nothing to do with any of the issues in the case. It's
20 not probative. And in order to make the claim they have
21 to bring in evidence about 20 other people.

22 It's not even a claim they made. It's a --
23 counsel saying to me in discussions and I was concerned
24 it was going to be raised, and I don't see the relevance
25 and see any relevance raised by them.

1 THE COURT: So your view is that the breach
2 of contract claims is limited to the damages for
3 franchisee's fees or commissions that United Marketing
4 would have received and whether United Marketing is
5 entitled to damages for violation of a noncompete,
6 nonsolicitation clause that they can prove.

7 MR. EINBINDER: Well, Your Honor, my view is
8 that the contract was unambiguous and our interpretation
9 is correct. But beyond that, Your Honor, they can't
10 prove damages.

11 We have a shifting target in terms of
12 damages. But the Rule 26 disclosure say that we by the
13 way, Your Honor, had to fight to get and they got
14 sanctioned for not providing to us and they still
15 haven't paid that sanction, Your Honor.

16 But what they told us in their Rule 26 is
17 that they were seeking disgorgement for the competition,
18 not loss profits but disgorgement for the competition.

19 And the alleged loss profits represented the
20 profit that they would have earned but for the fact that
21 my client terminated early. That's their claim. That's
22 what their claim is.

23 So if we're clear about that, Your Honor, as
24 a matter of law they're not entitled to disgorgement
25 which is the claim they made in their Rule 26 for our

1 competition.

2 THE COURT: Well, counsel just admitted that
3 there are -- there is a quantifiable monetary amount
4 that they seek which would be damages at law so there
5 would be no basis for equitable relief, call it
6 disgorgement or injunction really.

7 MR. EINBINDER: I agree with that, Your
8 Honor.

9 THE COURT: All right.

10 MR. EINBINDER: But when they provided a
11 Rule 26 disclosure and we conducted discovery based on
12 that, they contended that the competition claim -- the
13 damages for competition was disgorgement not loss
14 profits. That's as clear as a bell. That's what they
15 said, not what I said. It's what they said.

16 We build a case on that. And we come and we
17 make summary judgment motions, and they shift and they
18 make an allegation that the loss profits are really
19 about competition. So we addressed that, Your Honor,
20 and we call it speculative.

21 And the reason it's respective is they can't
22 provide -- they don't have a franchisee or a business in
23 the area that is making less money because we're
24 competing than they had before. They don't have
25 franchises. They're out of business. They don't sell

1 franchises, haven't for two years.

2 Your Honor, before my client quit the
3 franchise, they hadn't sold franchises. Not like they
4 had one next door or they wanted to put one in and
5 that's what they said in their papers. We couldn't put
6 a new franchisee in. It's a company out of business.

7 THE COURT: All right. I've asked you all
8 the questions that I have and I think I understand your
9 position. Thank you.

10 MR. EINBINDER: May I address one more
11 point, Your Honor?

12 THE COURT: Very briefly.

13 MR. EINBINDER: And I think you've already
14 addressed this, but I just want to make sure.

15 There has been a claim for breach of the
16 noncompetition and they're requesting an injunction.
17 And I believe you're indicating that it's not.

18 I think it should be dismissed as a matter
19 of law. They haven't established at all any of the
20 requisites for obtaining injunctive relief.

21 THE COURT: I said that I thought just a
22 second ago that they have not shown a basis for
23 disgorgement which is equitable remedy because they have
24 a quantifiable amount of damages.

25 And if they're out of business they don't

1 need an injunction. That doesn't mean that the Fowlers
2 are not liable for violating the noncompete or
3 nonsolicitation as relates to the breach of contract
4 claim.

5 MR. EINBINDER: The damage claim is a
6 different story. The injunctive claim is not, Your
7 Honor, I agree.

8 Thank you.

9 THE COURT: Thank you.

10 MR. SHERRY: Just very briefly, Your Honor.
11 With respect to the points raised on the motion in
12 limine, Your Honor, we believe that this information is
13 relevant because Mr. Einbinder has talked about the fact
14 that a number of franchisees left during a pretty
15 concentrated period.

16 Our positions always has been that the
17 franchisees jumped ship. We believe that this e-mail
18 shows the true motive of why the Fowlers terminated the
19 agreement because they wanted out.

20 And in 2007 when franchisees were beginning
21 to leave, Your Honor, this shows that the Fowlers were
22 reaching out to an outsourcer, to a third party who
23 provided these production services.

24 THE COURT: I thought you told me that the
25 contract allowed them to get out on 120 days' notice.

1 MR. SHERRY: It did, Your Honor, but --

2 THE COURT: So the reason doesn't matter,
3 does it?

4 MR. SHERRY: Well, I think it only matters
5 for purposes of showing the true motive as to why they
6 terminated the agreement. And I think it ties into they
7 terminated the agreement and immediately started doing
8 business -- started doing the same business only in
9 changing the name.

10 THE COURT: But is motive relevant for
11 breach of contract?

12 MR. SHERRY: Well, I think, Your Honor, I
13 think it is in this instance because of the fact that we
14 believe that the Fowlers alleged a breach is in fact not
15 true. That the evidence is going to show that they
16 never complained throughout the course of these services
17 being outsourced about that being a breach of the
18 agreement.

19 In fact they continued to accept benefits
20 under the contract. They provided the notice. The
21 notice didn't contain any details. There were no
22 written correspondence on or about the time of the
23 notice complaining about the outsourcing.

24 And in fact the company that they
25 immediately went to, and the evidence shows, Your Honor,

1 that as early as March of 2009 when they terminated, as
2 early as March they were contacting none other than
3 Precision Direct which is the company that they've been
4 talking about back in 2007 with these other franchisees
5 who ultimately jumped shipped.

6 So, Your Honor, we submit it's relevant for
7 those purposes.

8 THE COURT: All right, thank you.

9 Let the record reflect this matter is before
10 the Court on cross motions for summary judgment, and the
11 issues in both motions seem to be quite similar.

12 And at the outset, the question presented is
13 whether the Court should grant summary judgment as a
14 matter of law on plaintiff's breach of contract claim
15 because the plaintiff terminated the agreement without
16 giving the requisite 120-day notice and immediately
17 opened an identical business employing former UMS
18 employees in violation of the noncompete and
19 nonsolicitation clauses where the defendants claim that
20 the plaintiff breached the contract first and that their
21 nonperformance is excused because the plaintiff, United
22 Marketing materially breached the agreement by
23 outsourcing the printing and services.

24 I'm going to grant summary judgment in favor
25 of the plaintiff. The parties do not dispute the

1 defendant breached the agreement, and the nonperformance
2 is not excused by plaintiff's conduct because the
3 conduct does not constitute a material breach of
4 contract.

5 This is a franchise agreement involving the
6 distribution of mass mail business advertising coupons
7 to residential areas. And in May 2002, the defendant
8 entered into a ten-year area franchise license agreement
9 where the Fowlers became franchisees.

10 And this is a direct mailing coupon program
11 in territories located, I think, in the area of
12 Greensboro, North Carolina.

13 The contract does state in numerous places,
14 paragraphs four and five, that UMS was to furnish the
15 defendants with various printed products and production
16 services, including distribution of materials. UMS was
17 to be the sole source of direct mail co-opt advertising
18 products and services. UMS was to print and mail all
19 products within 15 days of the order.

20 And if there was a failure to follow up,
21 fill out these obligations, the defendant's remedy was a
22 credit toward future purchases.

23 I don't think the agreement is ambiguous. I
24 think that I don't think that the agreement requires
25 that only United Marketing Solutions could print coupons

1 that were being mailed directly to the consumer that the
2 franchisee never saw, as long as they can conform to the
3 intent of the agreement.

4 The sole source aspect of this means that
5 the franchisee was not to seek coupons from other
6 places. And these coupons, some of which were supplied
7 by, I believe, Lido's Pizza or Papa John were supplied
8 directly by the company itself.

9 So I have no difficulty here concluding that
10 this contract was not ambiguous and that the defendant's
11 theory that the plaintiff breached the contract by
12 outsourcing was a material breach which would excuse
13 their nonperformance.

14 So for those reasons, I'm granting the
15 plaintiff's motion, and I would likewise deny the
16 defendant's motion for summary judgment on the issue of
17 outsourcing.

18 And again, I note that defendant's complaint
19 about untimely deliveries of coupons or the quality of
20 coupons, even in the agreement itself, was covered by
21 credits. And the notice of termination made no mention
22 of unhappiness or complaint about the fact that the
23 outsourcing was insufficient, even if it was.

24 Just interpreting the contract with the
25 plain meaning, plain words, "furnish" means to provide.

1 It doesn't say that they have to produce it themselves.

2 It would be different if this were a
3 contract to produce sculpture or commissioned artwork or
4 something like that, some specialized person services
5 contract.

6 Here we're talking about a franchisor
7 agreeing to provide a system, services, documents, logos
8 and those things can be produced anywhere.

9 As it relates to whether the Court should
10 grant the plaintiff's motion for a loss profit damages
11 claim where the 120-day notice period was not complied
12 with and where the plaintiff's got out of business, it
13 seems to me that there is -- there's insufficient
14 evidence before the Court to -- and a genuine issue of
15 fact concerning loss profits and damages here.

16 I can't tell what the damages are, what the
17 Fowlers owed or should have paid, whether the profit is
18 the amount that would be recoverable under breach of
19 contract.

20 And so, for those reasons, I think it's a
21 question of fact for the jury, and I'll deny the motion.
22 And I'm not making any judgment now about whether or not
23 the damages are speculative because it seems to me these
24 businesses, at least the plaintiff's business has been
25 in existence for a significant period of time. And I

1 don't have enough information to make a judgment about
2 the defendant's business.

3 On the issue of whether the Court should
4 grant summary judgment for the defendant on a
5 plaintiff's request for equitable remedies of
6 disgorgement and preliminary injunction on its breach of
7 contract claim, it's clear to me from the colloquy and
8 from the briefs that what plaintiff seeks here are money
9 damages and they're quantifiable. That would mean
10 there's a remedy at law and equity would not allow --
11 would not apply because of the amount of money damages.

12 So I would deny the -- I will grant the
13 defendant's motion for summary judgment on the breach of
14 contract claims for disgorgement and for injunction.

15 Here, United Marketing is out of business so
16 there would be no showing of irreparable harm with
17 respect to injunction and enjoining the operation of the
18 Fowlers' new business.

19 Thank you.

20 On the motion in limine, I'm going to grant
21 the motion to exclude evidence of what the other
22 franchisees did. I think that plaintiff can present
23 evidence about the quantity of the work it provided,
24 that the Fowlers never complained about anything.

25 But whether other franchisees left and why

1 they left is irrelevant. And the e-mail from 2007 is
2 two full years before the Fowlers left. And it seems to
3 me that that does not bear -- does not tend to prove or
4 disprove breach of contract.

5 Let's take up plaintiff's motion to
6 withdraw. My question first is if you leave, who's
7 going to take over the case?

8 MR. SHERRY: Your Honor, we don't know who
9 is going to take over the case. We've not had any
10 discussions about what particular substitute counsel
11 that United Marketing intends to get, but we do believe
12 that they do intend to get substitute counsel.

13 THE COURT: Well, who would I send notice if
14 I allow you to withdraw? Do I have any statement from
15 the United Marketing Solutions that they're going to
16 hire counsel or who is their registered agent for
17 purposes of contact.

18 I see Daryl Reed's name on this service.
19 Has Mr. Reed filed anything?

20 MR. SHERRY: He has not, Your Honor. He's
21 the president of United Marketing Solutions. We've been
22 in touch with him over the course of the past two weeks
23 in discussions leading up to that, in filing the motion
24 and after that.

25 The address that we've included on the order

1 is the address of his personal residence which is where
2 service was posted, Your Honor.

3 The reason we filed a motion when we did was
4 because we're at a point in terms of the way things are
5 scheduled we had two months before the actual trial
6 date. We submit his --

7 THE COURT: I have an idea. I have an idea.
8 Mr. Green has not arrived.

9 MR. SHERRY: I'm sorry.

10 THE COURT: I have an idea Mr. Green has not
11 arrived.

12 MR. SHERRY: Mr. Reed, yes, your Honor.

13 THE COURT: Mr. Green has not arrived.
14 There's a fee issue here.

15 MR. SHERRY: Oh, sorry, Your Honor. I'm
16 very --

17 THE COURT: When I was in private practice,
18 we called it Mr. Green. And if Mr. Green didn't arrive,
19 then Mr. Lee would not go to court.

20 MR. SHERRY: Your Honor, I would say this
21 that Mr. Green may be -- he may be in the room, but
22 there were -- there were additional issues, Your Honor
23 that we --

24 THE COURT: Well, here is the difficulty I
25 have, counsel. And I certainly understand your position

1 and I've stood there before.

2 I don't have proof of services -- posted
3 service on Mr. Reed. He's not here. There's no
4 registered agent. What's going to happen to my lawsuit
5 if I don't have somebody before the court?

6 What I'd like you to do is to get him
7 personally served and set it for next Friday -- not next
8 Friday but the following Friday. And if he does not
9 appear, then I'll let you out.

10 But I can't -- I need to have some
11 understanding that he knows what's going to take place
12 with his lawsuit.

13 MR. SHERRY: I understand, Your Honor.

14 THE COURT: Thank you. You're excused.

15 Thank you.

16 (Proceeding concluded at 11:34 a.m.)

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER

2
3 I, Renecia Wilson, an official court
4 reporter for the United State District Court of
5 Virginia, Alexandria Division, do hereby certify that I
6 reported by machine shorthand, in my official capacity,
7 the proceedings had upon the motions in the case of
8 United Marketing Solutions vs. Angie Fowler, et al.

9 I further certify that I was authorized and
10 did report by stenotype the proceedings and evidence in
11 said motions, and that the foregoing pages, numbered 1
12 to 43, inclusive, constitute the official transcript of
13 said proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto
15 subscribed my name this 18th day of October, 2010.

16
17 /s/

18 Renecia Wilson, RMR, CRR
19 Official Court Reporter
20
21
22
23
24
25

RENECIA A. SMITH-WILSON, RMR, CRR